And Lord Birkenhead in the case of *Wilson & Anor.* v. *United Counties Bank, Ltd.*[4] —

"In the second place I think it necessary to point out that, unless the circumstances are wholly exceptional, appellants must be strictly held to the grounds of appeal which they think proper to set forth in the formal documents which are demanded from them. The object of indicating in detail the grounds of appeal, both to the Court of Appeal and to your Lordships' House, is that the respondent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. They are entitled to treat as abandoned contentions which are not set forth."

In my opinion, speaking for myself, the points raised by Mr. Sharma must fail. In the circumstances I allow the appeal with costs here and in the Courts below.

Thomson C.J. (delivering oral judgment): I agree with everything my Lord has said. I agree that if the respondent's vehicle was being negligently driven then in the circumstances which my Lord has described the defendant was vicariously liable. The authority for that is to be found in the case of *Rickets* v. *Thos. Tilling Ltd.* [1] and *Marsh* v. *Moores* [2]. I agree that it was fully admitted by the defendant that there was negligent driving. The whole case after the pleadings was conducted on the basis that the only issue was that of vicarious liability.

I would only add that in my view in making an order for a retrial, which in effect required the calling of evidence which the parties themselves had not called, the trial Judge was going to some extent beyond his powers.

In that connection I would mention the case of *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* [5]. That case is to be considered in the light of the earlier case of *Coulson* v. *Disborough* [6]. That case was decided in 1894 and in it the Court of Appeal had made some rather wide statements regarding a Judge's power to call evidence. In *In re Enoch's case* which was tried in 1909 Fletcher Moulton L.J. said (at p. 332):—

"……there is an idea that an umpire, a person in a judicial position, has the power, and, I suppose, the duty, to call witnesses in a civil dispute, whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case."

His Lordship went on to discuss the case of *Coulson* v. *Disborough, supra,* and said (at p. 333):—

"There may in some cases be a person whom it would be desirable to have before the Court; but neither party wishes to take the responsibility of vouching his personal credibility, or admitting that he is fit to be called as a witness. In such a case the judge may relieve the parties by letting him go into the box as a witness of neither party; and, of course, if the answers are immaterial he may refuse to allow cross-examination. But the dictum does not lay down, and in my opinion it is certainly not the law, that a judge, or any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties."

In my opinion it is thus clear that a Judge has no power to dictate to the parties what witnesses they shall call.

I agree with my Lord that the appeal should be allowed.

Azmi J. concurred.

Appeal allowed.

Solicitors: *H. L. Wrigglesworth; N. Sharma.*

LOOI WOOI SAIK v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) June 11, 1962]

[Penang — F.M. Criminal Appeal No. 12 of 1962]

Criminal Law and Procedure — Murder — Defence of provocation — Special exceptions — Burden of proof.

Evidence Ordinance, 1950, ss.3, 101, 102 and 105 — Direction to the jury — Penal Code, ss.302 and 304.

The appellant was convicted for the murder of a woman in contravention of section 302 of the Penal Code and was sentenced to death. At the trial the only question in issue was whether by reason of provocation the killing amounted to something less than murder and the only question before the Court of Appeal was the correctness of the trial Judge's direction on the question of provocation. The learned trial Judge had directed the jury as follows:

"Now, the defence in this case as put up by counsel is that the accused killed the woman whilst he was deprived of his power of self-control by reason of a sudden and grave provocation, and the question whether there was such provocation is a question of fact for you to consider. I think I had better say it now that when you are considering the defence story you do so only on the balance of probabilities, that is to say, if you think that the defence story is reasonably true, then you must say that he has discharged that burden. The burden is certainly on him on this question of provocation. Now, if the accused has succeeded in satisfying you on the balance of probabilities that there was provocation then, gentlemen, the offence he committed would not have been murder but culpable homicide, or man-slaughter as they call it in England. Now, the defence must satisfy you that the provocation was both grave and sudden and its gravity and suddenness not only deprived the accused of his power of self-control but would also deprive a reasonable man of his power of self-control."

Held: the learned trial Judge's direction to the jury was not correct; the proper direction to the jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it, then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of provocation. In this case it was quite impossible to say what view the jury would have taken had they been directed in proper terms. The conviction for murder must therefore be set aside and a conviction for culpable homicide not amounting to murder substituted for it.

Observations on the burden of proof and the general exceptions provided in the Penal Code.

Cases referred to:—

(1) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462.

(2) *Chan Kau* v. *R.* [1955] 1 All E.R. 266, 267.
(3) *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1.
(4) *R.* v. *Lobell* [1957] 1 All E.R. 734, 736.
(5) *Emperor* v. *U Damapala* A.I.R. 1937 Rang. 83.
(6) *Emperor* v. *Parbhoo* (1941) I.L.R. All. 843.
(7) *Government of Bombay* v. *Sakur* A.I.R. 1947 Bom. 38.
(8) *Soh Cheow Hor* v. *R.* [1960] M.L.J. 254.

COURT OF APPEAL.

David Choong for the appellant.

H. Sankey (Deputy Public Prosecutor) for the respondent.

Thomson C.J. This appellant was convicted at Ipoh for the murder of a woman named Wong Yik Hoe in contravention of section 302 of the Penal Code and was sentenced to death. He appealed against his conviction. On 22nd May, 1962, we allowed his appeal. We set aside his conviction for murder, we substituted for it a conviction for culpable homicide not amounting to murder in contravention of section 304 of the Penal Code and we imposed a sentence of 10 years' imprisonment.

There has never been any doubt, and indeed it has never been denied, that the appellant killed the woman for whose murder he was convicted. At the trial the only question really in issue was whether by reason of provocation the killing amounted to something less than murder. The only question before this Court was the correctness of the trial Judge's direction to the jury as to the way in which they should approach this question of provocation. In the circumstances a very brief statement of the facts will suffice.

Since some time early in 1961 the appellant and the deceased woman, who was married to another man, had been living together in Kuala Lumpur. On 25th August, 1961, the woman and a man who refused to give his name arrived at a lodging house in Kampar and were shown to a room on the first floor. Some hours later the appellant came to the lodging house and enquired for the woman and was taken to her room. A few minutes later noise was heard from the room and the lodging house keeper and his wife went up to it. They found the woman partially dressed and covered with blood. The appellant was also there but both witnesses swore the man who had earlier gone to the room with the woman was not there. The police were called and the woman was taken to the hospital. Nothing was apparently done about the appellant but he was later found lying on the road suffering from spinal injuries and showing signs of having drunk caustic soda. The circumstances pointed to his having taken caustic soda and then jumped out of the window of the bedroom in which he had been found with the woman.

The woman was found to have sustained some twelve stab wounds which could have been caused by a knife which was found in the bedroom and which the lodging house people said did not belong to them. She died from her injuries four days later but before doing so made a statement which was recorded by a Police Officer in circumstances which attracted no serious criticism at the trial.

The appellant, who gave evidence on his own behalf, said he had been living with the deceased woman, of whom he was very fond, for some months. She had at times talked of going to Kampar to look for work but he had opposed this on the ground that she had no need to work. During this time she had introduced him to a man, Yoke Kam who she said was her adopted younger brother. On the morning of 25th August, 1961, she again raised the question of going to Kampar. He pleaded with her not to go and said if she did he would commit suicide. He went to work but when he returned he found the woman had gone. He thought she must have gone to Kampar and went there to a lodging house where he and she had previously stayed together. The lodging house keeper showed him the room where she was. He knocked at the door which was opened and he then went in and found the woman and Yoke Kam both partially undressed and lying on the bed together. The man rushed out of the room. He remonstrated with the woman but she said she could do what she liked and hit him on the head with a teapot. After that he did not know what happened.

The woman in her statement said she had gone to Kampar to look for work. She had not been fetched by Yoke Kam whom she had known for about a year. On the way she met Yoke Kam who was also going to Kampar but that was a pure coincidence. At Kampar she went to the lodging house but she denied that Yoke Kam accompanied her there, she did not know where he went. While she was having a meal the appellant came into the room in which she was alone. He did not say anything but hit her over the head with a teapot. Then he stabbed her with a knife he had in his hand.

On all this there was clearly an available defence of grave and sudden provocation and clearly the first question that had to be considered in relation to that defence was whether or not Yoke Kam was in the bedroom when the appellant entered it. The appellant said he was. The woman said he was not and on that point her evidence was supported by the lodging house keeper and his wife though they did not support her story that Yoke Kam had never been in the bedroom.

In his summing-up to the jury Azmi J. dealt with the evidence and the law of murder with his usual care and accuracy. With regard to the question of onus of proof he told them in terms which have not been criticised here that the accused was presumed to be innocent, that the burden of proving him guilty lay all along on

the prosecution and if they failed to prove his guilt beyond reasonable doubt then they must acquit the accused.

At a later stage, however, when discussing the defence of provocation he said this:—

"Now, the defence in this case as put up by counsel is that the accused killed the woman whilst he was deprived of his power of self-control by reason of a sudden and grave provocation, and the question whether there was such provocation is a question of fact for you to consider. I think I had better say it now that when you are considering the defence story you do so only on the balance of probabilities, that is to say, if you think that the defence story is reasonably true, then you must say that he has discharged that burden. The burden is certainly on him on this question of provocation. Now, if the accused has succeeded in satisfying you on the balance of probabilities that there was provocation then, gentlemen, the offence he committed would not have been murder but culpable homicide, or manslaughter as they call it in England. Now, the defence must satisfy you that the provocation was both grave and sudden and its gravity and suddenness not only deprived the accused of his power of self-control but would also deprive a reasonable man of his power of self-control."

In our view this direction was not correct.

Our law of murder, except as regards so-called constructive murder, is not materially different from the law of England, at any rate as it stood prior to 1957. The definition of the offence in the Penal Code is, however, much more detailed and analytical than any statement of the English law. Section 299 says that in certain circumstances killing is culpable homicide. Section 300 goes on to say that if certain additional circumstances are present the killing amounts to murder. That section, however, states 5 exceptions one of which is provocation. If the case comes within any of these then what would otherwise have been murder is culpable homicide not amounting to murder. These are generally called "special exceptions" because they are special to the offence of murder. In addition sections 76 to 106 contain certain so-called general exceptions, such things as insanity, self-defence and duress which are available as defences to any criminal charge including murder.

What is involved in a charge of murder is set out as follows in Illustration (a) to section 152 of the Criminal Procedure Code:—

"A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Penal Code; that it did not fall within any of the general exceptions of the same Code and that it did not fall within any of the five exceptions to section 300, or that if it did fall within exception 1, one or other of the three provisos to that exception applied to it."

The question in the present appeal is the way in which a jury should be directed in a case of murder where one of the special exceptions or one of the general exceptions has been put forward as a defence. And here let me say that nothing that is said here is to be taken as having any necessary application to the question of insanity as a defence. That is a defence which has been generally regarded as standing in a class of its own, and in the present case we have excluded it from our consideration.

Since the case of *Woolmington* [1] the English law has been abundantly clear. The onus of proving the guilt of the accused person lies all along on the prosecution and as was said by Lord Tucker in the case of *Chan Kau* v. *R.* [2]:—

".....in cases where the evidence discloses a possible defence of self-defence the onus remains throughout on the prosecution to establish that the accused is guilty of the crime of murder and the onus is never on the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. Since the decisions of the House of Lords in *Woolmington* v. *Public Prosecutions Director* [1] and *Mancini* v. *Public Prosecutions Director* [3], it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions, save only in the case of insanity."

In the case of *R.* v. *Lobell* [4] Lord Goddard referred to *Chan Kau's case* and said this:—

"A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may, and sometimes does, strengthen the case for the prosecution. It is, perhaps, a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but, none the less, the onus remains on the prosecution. What it really amounts to is that if, in the result, the jury are left in doubt where the truth lies the verdict should be not guilty, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence."

In this country the question is governed by the terms of the Evidence Ordinance which is the same as the Indian Evidence Act and the present question is whether on the point with which we are concerned here the law as contained in that Ordinance is any different from the law of England.

It is generally accepted that the Indian Act was drafted by Sir James Stephen in 1872 with the intention of stating in a codified form the English law relating to evidence as it stood at that date. It is clear, however, from the historical portion of Lord Sankey's speech in *Woolmington's case*, which was decided in 1935, that prior to the decision of that case the English law had been thought to be somewhat different from the law as there stated and it is thus possible that the law as understood by Sir James Stephen and embodied by him in the Evidence Act in 1872 differs from the law of England as it has been accepted since 1935. It is, therefore, necessary to consider the provisions of the Act and of our own Ordinance in some small detail.

The general exceptions and special exceptions contained in the Penal Code are specifically dealt with in section 105 which reads as follows:—

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Illustration (b) refers in terms to the defence of provocation in relation to murder and reads as follows:—

"A. accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on A."

Section 105, however, is not to be read in isolation but in relation to the Ordinance as a whole. In particular sections 101 and 102 provide in effect that in a criminal case it is for the prosecution to prove the guilt of the accused person. In the words of illustration (a) to section 101:

"A. desires a Court to give judgment that B. shall be punished for a crime which A. says B. has committed. A. must prove that B. has committed the crime."

Again, section 3 differentiates between the cases where a fact is "proved" or "disproved" or "not proved". As to whether it is proved or disproved the criterion is whether or not under the circumstances of the particular case a prudent man would act upon the supposition that it exists or upon the supposition that it does not exist. Where by that criterion the fact is neither proved nor disproved it is said to be not proved.

In the case of murder where a defence such as provocation is set up there would seem to be a conflict of presumptions. On the one hand there is the presumption of innocence of the offence of murder which arises from section 101; on the other hand there is the presumption of the non-existence of provocation which arises from section 105. That conflict, however, in our view is more apparent than real, for clearly the hypothetically prudent man envisaged by section 3 would demand different standards of proof in the two cases and in so far as there was any conflict would have no doubt as to which presumption should prevail. In any event the only logical result is that the presumption of innocence must be the stronger. Where there is any reasonable doubt as to whether the accused person has brought himself within the exception of provocation that must in its turn create a doubt as to whether he is guilty of murder and, therefore, a prudent man would not regard that offence as proved against him.

In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation.

This, of course, is the same as the position which has been accepted to be in England since *Woolmington's case*. As was said by Lord Sankey in *Woolmington's case* (at p. 481):—

"If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of the gold.

It should be added that the course of reasoning which has been followed here is similar to that which led the Rangoon Court to the same conclusion in the case of *Emperor* v. *U Damapala* (5) which was the first case where the question was considered in India after the decision in *Woolmington*. In that case Roberts C.J. (at p. 86) held that the decision in *Woolmington's case*:—

".....is in no way inconsistent with the law in British India. Indeed the principles there laid down form a valuable guide to the correct interpretation of section 105, Evidence Act."

Dunkley J. with reference to the same case said (at p. 87):—

"The judgment of Viscount Sankey L.C., in this case ought to be accepted as a binding authority by every criminal Court in British India in so far as the law of British India on the subject, which is comprised within the terms of section 105, Indian Evidence Act, coincides with the law of England."

That case was followed by the Allahabad Court in the case of *Emperor* v. *Parbhoo* (6) and indeed has been generally followed in India except in Bombay where a different view was taken in the case of *Government of Bombay* v. *Sakur* (7).

In Singapore the attitude of the Court has to some extent varied in the past. In the latest reported case, however, that of *Soh Cheow Hor* v. *Regina* (8), which was a murder case where the defence was that the case came within one of the special exceptions set out in section 300, the Singapore Court of Criminal Appeal said (*per* Rose C.J. at p. 254):—

"Whatever the position may have been in the past, it appears now to be the accepted rule that when an accused person endeavours to bring himself within one of the exceptions, it is sufficient for his purpose if a reasonable doubt is raised in the minds of the jury as to whether or not the necessary factors exist. If as a result of the evidence of the whole case, taken and considered

together, the jury find themselves in genuine doubt as to whether or not the case falls within one of the exceptions, then their verdict on the point must be in favour of the accused."

As regards provocation the present case was very much a borderline one. We found it quite impossible to say what view the jury would have taken had they been directed in what we consider the proper terms and it was for that reason that we set aside the conviction for murder and substituted for it the conviction for culpable homicide not amounting to murder.

Conviction for murder set aside and conviction for culpable homicide substituted.

Solicitors: *Lim, Lim & Oon.*

ESA & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) June 20, 1962]

[Muar — Criminal Appeal Nos. 9-11 of 1962]

Criminal Law and Procedure — Joint trial — Same offence or offences in the course of same transaction — Criminal Procedure Code (Cap. 6), ss.163 and 170.

Road Traffic — Using omnibus in contravention of terms of licence — Road Traffic Ordinance, 1958, s.120(2) — Whether driver was carrier under Ordinance — Whether evidence of similar offences admissible — Prosecution to prove that vehicle was being operated in contravention of conditions in licence.

This was an appeal by the driver of an omnibus, the company operating the omnibus and its manager against the conviction by the Magistrate for using the omnibus in contravention of the terms of the licence under which it was operated and punishable under section 120(2) of the Road Traffic Ordinance, 1958. It was contended, *inter alia*, for the appellants: (1) the trial of the 3 defendants together contravened section 163 of the Criminal Procedure Code and was therefore a nullity, (2) the driver could not have been charged for carrying more passengers than the vehicle could carry because the only person that carries is the carrier and not the driver, (3) it must be proved that the company was the registered owner before section 138 can operate, (4) as the offence was absolute the evidence of similar offences led was not admissible as it did not fall within the example outlined in *Rex* v. *Raju & Ors.* (4), and (5) the prosecution failed to prove that the company were licensed under Part V of the Ordinance and the licence which was produced was not a licence at law.

Held: (1) as the defendants were charged with the same offence or of different offences committed in the course of the same transaction there was no reason why they should not be tried together as it was more convenient that they were so tried. Principles enumerated in *Foo Yong Fong* v. *R.* (2) applied;

(2) as the person who carries is the carrier (i.e. the company) the first appellant could not have been convicted for using the vehicle. He should have been charged and could have been convicted of the abetment of the commission of the substantive offence by the company;

(3) there must be some evidence on the record that the company of which a defendant is alleged to be the manager is the registered owner of the vehicle. As a report that the company were the owners were not amplified the manager could not be deemed to have committed the offence and should not have been called to make his defence;

(4) as the offence was absolute, the evidence of similar offences led was not admissible as it did not fall within the examples outlined by Spenser Wilkinson J. in *Rex* v. *Raju & Ors.* (4). It would be evidence against the manager who was being proceeded against under section 138(4) of the Ordinance;

(5) the prosecution failed to prove that the vehicle was being operated in contravention of conditions by the licence which authorised its use — following *The Coastal Bus Co. Ltd.* v. *Public Prosecutor* (6).

Cases referred to:—

(1) *Rex* v. *Dennis* and *Rex* v. *Parker* [1924] 1 K.B. 867.

(2) *Foo Yong Fong & Anor.* v. *R.* [1962] M.L.J. 156.

(3) *Spires* v. *Smith* [1956] 2 All E.R. 277.

(4) *Rex* v. *Raju & Ors.* [1953] M.L.J. 21.

(5) *Reg.* v. *Khoo Guan Teik* [1957] M.L.J. 128.

(6) *The Coastal Bus Co. Ltd.* v. *Public Prosecutor* p. 324, *supra.*

CRIMINAL APPEAL.

F. Keith Sellar for the appellants.

Raja Azlan Shah (Legal Adviser) for the respondent.

Adams J.: This was an appeal by Esa bin Khamis, the driver of an omnibus No. JA. 6965, the Omnibus Company operating the omnibus, and Mr. Ong Seng Swee who was the manager of the defendant omnibus company, against the conviction by the Magistrate, Batu Pahat, for an offence arising out of the use of the vehicle in contravention of the terms of the licence under which it was operated.

I would like to draw attention at the outset to the fact that this case was conducted in the Magistrate's Court by the Hon'ble the Legal Adviser and not by the Deputy Public Prosecutor. It may therefore be assumed that it was appreciated from the outset that this case was likely to raise legal difficulties. In those circumstances, without in any way wishing to belittle the ability of the Magistrate, Batu Pahat, the case should have been put into the President's list so that someone who was legally qualified could apply his mind to the legal problems which were obviously going to arise, and which have occupied this Court during the morning.

Secondly, although Mr. Ong Seng Swee appeared in answer to the summons served upon him, no doubt upon the advice of Mr. Sellar, it would appear to me that it indicates slovenly investigation, and careless issue of process by the issuing Magistrate, to issue a summons addressed to 'Manager', Coastal Omnibus Company. I trust that Magistrates, on receiving such applications in future will instruct the police to address the summons to the person who as a result of their investigation they know to be the manager or managing director at the material time, that is to say at the time the offence was committed.

The defendant, Esa bin Khamis was charged as follows:—

"That you on the 9th day of August, 1961, at about 12.30 p.m. at the junction of Jalan Jeragan and Minyak Beku, in the District of Batu Pahat, in the State of Johore, being the driver of Stage Bus No. JA: 6965 licensed under Part V of the Road Traffic Ordinance, 1958, did use the said stage bus in contravention of a condition attached to the licence under the provisions of section 119 of the said Ordinance, to wit carrying passengers in excess of the specified number mentioned in the said licence, and you thereby committed an offence punishable under section 120(2) of the said Ordinance."